

IN RE ARBITRATION BETWEEN:

**AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES,
AFSCME, COUNCIL 5, LOCAL 340**

and

HENNEPIN COUNTY

DECISION AND AWARD OF ARBITRATOR

BMS Case # 06-PA-1223

JEFFREY W. JACOBS

ARBITRATOR

December 8, 2006

IN RE ARBITRATION BETWEEN:

AFSCME Council 5, Local 34,

and

DECISION AND AWARD OF ARBITRATOR
BMS Case 06-PA-1223
Pat Shepard grievance matter

Hennepin County.

APPEARANCES:

FOR THE UNION:

Matt Nelson, Business Representative
Pat Shepard, Grievant
Mary Jorgenson, Tribal Social Worker
Deputy David Kyle, Henn. Cty Sheriff
Lew Linde, Attorney
Duane Bartz, Henn. Cty. Attorney's Office
Kelly Sarenpa, Union Steward

FOR THE COUNTY

Christina Yates, Labor Relations Representative
Weida Allen, Social Worker Children's Law Center
Betty Wentworth, Guardian Ad Litem
Jan Liscombe, Social Worker
Jill Tollefson, Social Work Unit Supervisor
Margaret Thunder, Human Services Program Mgr.
Bill Peters, Director of Labor Relations

PRELIMINARY STATEMENT

The hearing in the above matter was held on October 30, 2006. in Room A-400 in the Hennepin County Government Center in Minneapolis, Minnesota. The parties presented oral and documentary evidence at which point the hearing record was closed. The parties submitted Briefs postmarked November 22, 2006 and received by the arbitrator on November 24, 2006 at which point the record was considered closed.

It should be noted that the original discipline was a 5-day suspension for the events of October 11, 2005 but that the County reduced this to a 1-day suspension a few days before the arbitration hearing in this matter. The record reveals that 4 of the original 5 days have been reinstated and back pay paid for those days.

ISSUES PRESENTED

The parties stipulated to the issue as follows: Did the employer have just cause to impose a 1-day suspension on the grievant and if not, what shall be the remedy?

PARTIES' POSITIONS

COUNTY'S POSITION:

The County's position is that there was just cause for the grievant's 1-day suspension given her demeanor and her actions on October 11, 2005. In support of this position the County made the following contentions:

1. The grievant is a social worker assigned to the child protection unit. She works mostly with Native American populations and was assigned to the case of a young girl BN. The County argued as will be discussed below, that the grievant as a long term employee knew her obligations to conduct herself in a professional manner at all times, especially when in the presence of the very children she was assigned and responsible to protect. Her demeanor around these children is crucial to the administration of their case and in modeling proper adult behavior.

2. BN had been on the run for a period of time but contacted her Guardian Ad Litem, Betty Wentworth, on the evening of October 9, 2005 to turn herself in. Contrary to what most Guardian Ad Litem, or GALs as they are referred to, would do, Ms. Wentworth took the extra step of picking the girl up and transporting her to various places that evening to make sure she had a safe place to stay.

3. The grievant met BN and the GAL as well as several other people connected to BN's case at Juvenile Court on the morning of October 11, 2005. The grievant became angry even incensed about Ms. Wentworth's actions and shouted at her in the hallway in a very loud voice berating her actions and telling her that in essence she, i.e. the grievant ran the show. This she did in a loud very demanding tone that startled several witnesses and passersby.

4. Ms. Allen testified that the grievant was "ranting" and screaming and that this went on for a period of up to 15 minutes. She even continued the tirade after taking a phone call for a few minutes.

5. The County pointed to this behavior as highly inappropriate and even damaging to the child since she was there for all of it.

6. The County pointed to at least 2 prior instances wherein the grievant had been warned of the need to tone her behavior down and to act at all times in a professional manner. She received a written warning in January of 2003 regarding her behavior and tone of voice when dealing with clients and other persons connected with her case file. The County also introduced testimony in rebuttal to the Union's claim that the prior instances were not usable. Mr. Peters testified that the County must keep the discipline on file for data practices purposes even though it may not appear in the official personnel record and that the contract provision at Article 32, section 6 C only requires that the discipline be pulled if the employee requests that it be removed within 2 years of the date of the discipline. She did not request that it be removed. Moreover, it remains there for 3 years following the date of the reprimand. Here less than 3 years had passed between January 2003 and December 2005. Thus, the prior warning is to remain in the file and can be used to determine the appropriate level of discipline to be meted out in these circumstances.

7. In addition, she received a coaching session in August of 2005 for her actions connected to the Honor the Youth Spiritual Run. The County acknowledged that the August 2005 event was off duty but involved many of the very same people the grievant works with in her official duties. The County argued that the grievant was specifically warned about almost the very same type of behavior she was accused of on the morning of October 11, 2005.

8. The County argued that it did a fair and thorough investigation and determined that the bulk of the evidence against the grievant was in fact true. They interviewed all of the relevant witnesses, specifically Ms. Allen and Ms. Liscomb both of whom indicated they were very troubled by what they saw that day. The County noted that it attempted to interview Mr. Bartz but he declined to be interviewed.

9. The County argued that the Union's attempt to construct a conspiracy theory by implicating Mr. Tigie, who did not testify at all in this proceeding, is simply preposterous and should be rejected by the arbitrator and baseless.

10. The essence of the County's argument is thus that the grievant's actions that day, whether she was justified or not, were unprofessional and inappropriate. The County argued that the greater weight of the evidence supports the assertion that the grievant did not simply speak in a firm tone but rather yelled at the GAL and even the child. He certainly shouted and continued this tirade in the presence of the child. Moreover, any failure of the investigation is rendered moot by the evidence presented at the hearing; the evidence there supported the County's position anyway and there is nothing that a further investigation would have revealed anyway.

The County requests an award denying the grievance in its entirety.

UNION'S POSITION

The Union's position is that the County did not have just cause for the suspension and that the grievant did not violate any rules in the matter nor did she act inappropriately on the date in question. In support of this position the Union made the following contentions:

1. The Union pointed to the grievant's long and excellent work record. Other than the reprimand in January 2003 the grievant's work record is free of other discipline. The Union argued very strenuously that the January 2003 incident should not have been used since there was an agreement to hold it in abeyance pending mediation. The mediation never occurred and the grievant was led to believe that the matter had been simply dropped. Otherwise she could have proceeded to arbitration and had that resolved there.

2. The County used a so-called coaching session from an August 2005 incident as the partial basis for the discipline used here. There was no coaching session regarding the Honor the Youth Spiritual Run. The Union even pointed to the County's own witness who acknowledged that the meeting held in August of 2005 was not a formal coaching session.

3. Moreover, the Honor the Youth Spiritual run was not a work related matter and was done entirely on the grievant's own time. The session held to discuss the August events was held three days *after* the events leading to her discipline on October 11, 2005. Thus it is disingenuous at best to argue that there was a coaching session held prior to the October 11, 2005. It simply did not happen.

4. The Union and the grievant argued most strenuously that the events as described by the County's witnesses on October 11, 2005 did not unfold as they related them. The grievant was understandably upset with the Guardian Ad Litem who had clearly acted improperly in transporting the youth in question without notifying the grievant or the proper authorities. She acted without authorizations and even recklessly and this very much needed to be brought to her attention in the strongest possible way.

5. Still however, the grievant, according to the Union did not "scream and yell" or "rant" as she was characterized to have acted by County witnesses. She used a firm tone of voice but never became violent or even so out of control that it raised any issues with the security deputy who was there all the while and who never took any action to intervene or eject anyone from the hallway.

6. The Union argued that the grievant's actions were appropriate and were frankly simply exaggerated by the County's witnesses. Several of the Union witnesses testified that the grievant's actions were very much as she presents herself in general conversation. There was certainly nothing to suggest that the County had ever warned her that her usual manner of addressing others in her cases was contrary to the policy or the desires of County management.

7. Finally, the County did not even interview several critical witnesses who were there and who would have told the County a very different story if they had been interviewed. Not the least of these was Mr. Jorgenson, Mr. Linde and Mr. Bartz. All these people were there and heard much if not all of the conversation. None of them indicated that the grievant was "ranting" nor did she scream as County witnesses characterized her actions.

8. The Union's claim is that the grievant while understandably upset with the GAL, did not lose control or act inappropriately for the context in which she found herself. This action occurred in the hallway of juvenile court where people frequently are loud and where emotions run very high. Nothing in the grievant's demeanor nor actions that day went beyond the pale.

9. The essence of the Union's claim is thus that the grievant did not act inappropriately and that her tone of voice and the language she used was in keeping with her usual and customary way of addressing people. She needed to be firm in order to impress upon the GAL the seriousness of the violation she had just committed and the need to stay within her role. Moreover, the County's lack of proper investigation is a fatal flaw in the case since they failed to interview several material witnesses who would have told them a very different story. This could certainly have altered the decision to impose discipline or of the degree of discipline in this case.

The Union requests an award sustaining the grievance, expunging the grievant's record of any discipline and awarding her full back pay and accrued benefits due to the County's actions herein.

DISCUSSION

The grievant is a long time employee of the County, having worked there since 1993. She is an Indian Child Welfare Senior Social Worker and typically works with Native American populations. Her evaluations show that she meets or exceeds expectations and has been generally rated as fully capable.

The grievant has a written warning on her record from January 2003. County Exhibit 7 shows that the grievant was given a written reprimand for actions, which occurred on October 29, 2002 when she was allegedly observed arguing with a child's attorney in the presence of the child. The allegations from this reprimand were similar in nature to the events leading to the instant matter.

Had this reprimand stayed on her record unchallenged it would have been much clearer that she had been put on notice of the type of behavior that was expected of her. The record also reveals that she did challenge this and that the grievant and County managers met to discuss and possibly resolve the January 31, 2003 written reprimand. Union Exhibit 4 shows that on March 17, 2003 the grievant met with the Department Director and her Union steward to mediate the grievance with a request that it be removed. The evidence showed that the written reprimand was stayed pending a mediation to resolve that issue as well as “conflict issues” between several staff members at the time. There was no indication that the mediation ever occurred or that the stay of the reprimand was ever lifted.

The parties spent considerable time arguing over whether the January 2003 reprimand was still in the grievant’s personnel file. The Union claimed that it requested a copy of the grievant’s file but that this reprimand was not there when so requested. The Union claimed that due to this and the provisions of Article 32, section 6 C, it should have not been there.

The County argued that under that provision, the discipline is not removed from her file and in fact must remain there pursuant to the Data Practices Act. Under the terms of the contract language, it can be removed if the employee requests that it be removed within 2 years of the discipline *and* if no further disciplinary action is taken against the employee. Here the employee made no such request. The discipline can also be removed after 3 years of the reprimand if no disciplinary action has been taken against the employee for the same or similar offenses. Here, 3 years had not expired.

The problem here is not however related to the contract language but rather to the apparent agreement to stay the reprimand made in March of 2003. While it appears that similar if not almost identical allegations were made against the grievant in January of 2003, there was an agreement to stay it in March. That sent a message to the grievant that even though there was a statement by the Department Director at the time that he felt there was some merit to the allegations he decided to stay the reprimand. The grievant had nothing to grieve at that time and there was no final resolution of that matter.

The issue thus is notice to the grievant of what behavior is and is not expected of her. Clearly she was on notice that her conduct was viewed by others as inappropriate and abrasive. The fact that there was the agreement to stay the reprimand sent a very different, even opposite message. Accordingly, while the County's witnesses are correct in their interpretation of the contract language of Article 32, section 6 C, on these unique facts, the January 2003 disciplinary matter cannot be used to support the penalty imposed since it was not a clear and unequivocal message to the grievant regarding the behavior that was prohibited.

The next question was whether the so-called coaching session held in August 2005 and the subsequent meeting in October of 2005 can be used to support the penalty or the discipline here.

These meetings stem from allegation that the grievant's demeanor and actions were inappropriate during the planning of the Honor the Youth Spiritual Run. The record shows that the grievant does this off duty but with many of the same people with whom she works in her professional capacity with the County. The record did not go into specifics but again the grievant was accused of using inappropriate and abrasive language and demeanor in dealing with several people during the planning stages of this event. The grievant claimed that these conflicts were due to inter-tribal matters that had little to do with work.

The August meeting was not a true coaching session. Moreover, the October meeting occurred 3 days after the incident that gave rise to the discipline in this matter. Yet the County's letter of December 2, 2005 made specific reference to an August coaching session. The County's witnesses testified that this was a mere typographical error. Either way, the August session was not a true coaching session. The October meeting cannot be used to support this discipline because frankly it occurred after the events in question. The discipline for the October 11, 2005 incident must thus rise or fall based on the evidence of what occurred then.

The child in question called the GAL late on a Sunday evening to turn herself in. She had apparently been on the run and the police were on the lookout for her. The GAL did not contact the grievant but instead took the child to a facility she thought could take her. The child did not want to stay there so they went to another location. Eventually the child was placed and the GAL, the child, her attorneys, the grievant and the County's attorney as well as others went to Court on the morning of October 11, 2005 to go before a judge to get a disposition of the child's case. It was in the hallway at that hearing that the operative events occurred.

The Ms. Wentworth, Ms. Weida Allen and Ms. Jan Liscomb testified that the grievant was screaming at both Ms. Wentworth, who apparently bore the brunt of the grievant's comments that day, and the child for their actions. They testified that she berated them at length and made comments to the effects that she runs the show and that the County social worker, not the GAL is responsible for placing the child. The evidence showed that for the most part, what the grievant said was accurate and that the GAL had indeed overstepped her bounds considerably and failed to take various steps that she should have in that role. The County did not argue that point but rather argued that it was not the message but rather the manner in which that message was delivered that caused the discipline.

The stories diverged somewhat. The County's witnesses testified that the grievant was out of control. Yelling, ranting, screaming and other illustrative terms were used to describe her behavior that day. They went to County management to report what they felt was inappropriate behavior by the grievant in her demeanor. They testified that she even took a phone call during the middle of the conversation yet failed to cool off and continued the tirade after that. They described this whole affair as embarrassing and demeaning to the GAL and mostly, the child who was there to witness all of it.

Union witnesses disputed this version of events. The grievant and several others described the grievant's demeanor as firm but not belligerent nor inappropriate. They alleged that she needed to affirm that the GAL had indeed gone out of her boundaries and that the child needed to do certain things as well. Union witnesses did not feel that the grievant was out of control nor was she yelling or engaged in the sort of wild-eyed behavior that the County's witnesses described.

Ms. Allen was quite clear that the grievant was out of control. Ms. Liscomb painted a similar picture. The GAL did too but she was the object of this and may well have felt it more simply because it was clear that she had made missteps in her handling of the matter and may well have felt worse due to that.

Mr. Jorgenson did not describe the events, as did the County's witnesses. While she was not completely clear in her testimony she did say that she did not feel as though the grievant was yelling or screaming.

Mr. Linde may not have been there for the entire event. It was unclear what he saw although he did describe himself as being in the area. Had the grievant been yelling as loud as she was alleged to have been this would have been heard far away from the entry to the courtroom.

Deputy Kyle did not feel as though he needed to intervene. It was clear however that he rarely does so and sees this type of behavior frequently in Juvenile Court. Emotions run very high here and he is there to make sure nothing truly violent occurs. Thus the fact that he did not intervene to either break up this conversation or to escort someone from the hallway was of little evidentiary significance.

Mr. Bartz also described the grievant as "Pat being Pat" and did not indicate that she was ranting. Significantly though he did describe the grievant's behavior that day as essentially inappropriate insofar as it did occur with the child sitting right there.

It is against this divergent set of facts that the matter must proceed. Obviously it was difficult given the two sets of fairly divergent sets of descriptions of this event to determine precisely what happened. As one noted arbitrator once said, the easy cases are the ones in which someone is lying, the more difficult ones are those where everybody is lying but the hardest still are the ones, as I suspect this one is, where everybody is telling the truth. Individual perceptions of subjective measures of others actions are difficult to measure. Whether someone was ranting may well depend on who is telling the story and what that person perceives as ranting. One person's ranting may well be another's firmness and assertiveness. While it is true that several County witnesses had nothing to gain from their testimony it was equally true that many of the Union witnesses did not either. Each gave their own perspective on the events of that day. What differed was their qualitative take on things.

The Union did raise one significant flaw in the County's case however that needs to be addressed. Arbitrators have for years used a series of "tests" to determine whether just cause exists for the imposition of discipline. Not all use them but most do and even if they don't they always provide a good roadmap to see if the employer has provided adequate proof of the existence of just and proper cause for employee discipline.

These tests were first articulated by Arbitrator Carroll Daugherty in *Grief Bros. Cooperage*, 42 LA 555, 558 (1964). See also, *Enterprise Wire Co.*, 46 LA 359 (Daugherty 1966). In these cases Professor Daugherty notes that a negative answer to any of these questions may well mean that there is insufficient cause for the discipline imposed. These tests are as follows:

1. Did the Company give to the employee forewarning or foreknowledge of the possible consequences of the employee's conduct?
2. Was the Company's rule or managerial order reasonably related to the orderly, efficient and safe operation of the Company's business?
3. Did the Company, before administering the discipline to the employee make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?
4. Was the Company's investigation fair and objective?
5. At the investigation, did the "judge" obtain substantial evidence of proof that the employee was guilty as charged?
6. Has the Company applied its rules, orders and penalties evenhandedly and without discrimination to all employees?

7. Was the degree of discipline administered by the Company in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the Company?

Here as discussed above, there was some concern raised about the notice to the grievant of the need to be frankly less strident and aggressive in her interactions with others. The question here is not so much notice of the need to be professional but rather to define what that is. Here there was little question that the County's policies were clear enough in the requirement to act professionally. The concern is that the grievant has apparently been comporting herself in the way in which she did here for years without a clear and unequivocal message being sent to her as to what was "over the line."

More importantly were the concerns raised by the Union regarding the investigation of this matter. Several material witnesses were known to the County yet not interviewed prior to implementing discipline in this matter. The County argued essentially that these oversights were merely harmless error and that the testimony at the hearing supported their position. The problem is that the evidence there did not completely support the County's position and diverge greatly from what the County's witnesses said about how the grievant conducted herself on that day. Here the Union's point about the need to maintain due process and to perform a complete and thorough investigation was well taken. The evidence showed that the County interviewed 3 witnesses, determined that they were credible and essentially passed over other witnesses whom they knew or should have known were there without getting their side of the story. Significantly, their stories were different from those of the County's witnesses. Thus questions posed by Arbitrator Daugherty regarding investigation cannot be answered in the affirmative here. This was not simply harmless error.

Having said that this does serve to undercut the degree of discipline imposed does not constitute a fatal flaw in the County's case on these unique facts. The evidence showed clearly from all witnesses that the conversation was at the very least very firm and at times heated. The problem here is that it occurred in a public hallway in the presence of the very child that was the subject of the case.

The evidence demonstrated that it is the goal of the department to model appropriate adult behavior for these children who are in many cases in desperate need of such modeling. Even taking the grievant's story as she presented it shows that she acted inappropriately in this situation by conducting the conversation in the hallway in front of others and in front of the child. Thus, whether she was ranting or not, the record showed without doubt that she conducted herself in an inappropriate manner on October 11, 2005 and that there was just cause for some level of discipline.

The final question posed by Daugherty is whether the penalty fits the proven crime under the facts and circumstances of a given case. Arbitrators should be very careful not to simply substitute their judgment for that of the employer in changing the level of discipline. Doing so must be based on articulable reasons. Here the record supports a reduction in the level of the penalty imposed. As noted above, the record showed that the County relied on the January 2003 discipline as discipline that had been imposed and was an ungrieved part of the grievant disciplinary records. It was not. The County also relied on the August events which were not considered discipline and for which she was not given a formal reprimand of any kind. While it was clear she was on notice she had to tone down her style it was not clear on the date in question what that was,.

Further, the flaws in the investigation were significant here. More needed to be done to determine the facts of this particular case. Doing so might well have resulted in something different here and the question is one of due process.

Upon consideration of all of the facts and circumstances it is determined that the suspension should be reduced to a formal written reprimand. It is also clear that the grievant must take this warning to heart and conduct herself in the future in accordance with the County's policy regarding professional behavior and proper modeling for the very clients she serves. Accordingly, the grievance is to be denied insofar as it relates to the question of whether there is just cause for the discipline but sustained insofar as it relates to a reduction of the penalty imposed.

AWARD

The grievance is SUSTAINED IN PART AND DENIED IN PART. The discipline is sustained but the penalty reduced to a written warning to be placed in the grievant's file per the provisions of the collective bargaining agreement. The grievant shall be made whole for the lost wages and any benefits as the result of the 1-day suspension imposed herein.

Dated: December 8, 2006

Jeffrey W. Jacobs, arbitrator

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